No. 17-6086

IN THE

Supreme Court of the United States

HERMAN AVERY GUNDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE, REASON FOUNDATION, AND CASCADE POLICY INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Sex Offender Registration and Notification Act's delegation of authority to the Attorney General to issue regulations under 42 U.S.C. § 16913(d) violates the nondelegation doctrine.

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INTEREST OF *AMICI CURIAE*[1]

Amici are organizations which believe liberty under law requires that the people choose the legislators who decide the rules of private conduct.

The **Competitive Enterprise Institute** ("CEI") is a nonprofit 501(c)(3) organization incorporated and headquartered in Washington, D.C., dedicated to promoting the principles of free markets and limited government. Since its founding in 1984, CEI has focused on raising public understanding of the problems of overregulation. It has done so through policy analysis, commentary, and litigation.

The **Reason Foundation** is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by applying and promoting libertarian principles and policies—including free markets, individual liberty, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant constitutional and legal issues.

The **Cascade Policy Institute** is a nonprofit policy research organization based in Portland,

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amici*, their members, or their counsel made such a monetary contribution. All parties have consented to the filing of this brief.

Oregon. Cascade's mission is to promote public policies fostering individual liberty, economic opportunity, and personal responsibility. A significant threat to this mission is the continued expansion of government, including unauthorized delegation of regulatory authority to federal and state agencies.

SUMMARY OF ARGUMENT

Herman Gundy was convicted of violating the Sex Offender Registration and Notification Act ("SORNA"). Pub. L. No. 109-248, tit. I, 120 Stat. 587 (2006) (codified as amended at 34 U.S.C. § 20911 et seq.). SORNA itself does not specify whether its criminal penalties apply to individuals, such as Mr. Gundy, who were convicted of a sex offense *prior to* the statute's enactment. Instead, SORNA empowers the Attorney General to resolve this crucial question—along with any other rules of conduct the Attorney General wishes to impose on such individuals. 34 U.S.C. § 20913(d) ("The Attorney General shall have the authority to specify the applicability of the requirements of [SORNA] to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with [initial registration].").

Deciding which rules will govern Mr. Gundy's conduct is the sole province of this nation's legislature, not the Attorney General. This principle has deep roots in English common law. Sir Edward Coke declared that the executive could not "create any offence by his prohibition or proclamation, which was not an offence before." *Case of Proclamations* [1610],

77 ER 1352 (KB). When this principle was ignored, by delegating lawmaking power to the King in the Proclamation by the Crown Act (1539), Sir William Blackstone called it "the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom." 1 *Commentaries on the Laws of England* *271 (1765).

Our Founders implemented this restriction in the Constitution through the Legislative Vesting Clause, U.S. Const. art. I, § 1, which in turn is properly interpreted in accordance with the common law of agency. The common law prohibits the subdelegation of any power that requires discretion or judgment. In contrast, ministerial duties, which are mandatory and essentially involve no discretion, may be subdelegated. This is the essence of the nondelegation doctrine.[2]

The Legislative Vesting Clause provides that only Congress has discretionary power over the general rules of private conduct. Ministerial duties, such as duties conditioned on whether a certain event has occurred, may be delegated by Congress.

During World War II, the Court, in response to the wartime emergency, allowed Congress to go beyond this limit. Congress' power was expanded to allow delegations not only to answer factual questions, but judgmentally select the facts on which policy is based. While not necessary for this case, the Court should

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[2] The doctrine is actually a prohibition on subdelegation, not nondelegation. Power is delegated to Congress by the people, and cannot be subdelegated to any other person. However, because it is commonly referred to as the nondelegation doctrine, that phrase will be used to describe it.

overrule these opinions to clarify the nondelegation doctrine.

SORNA delegates discretionary power to the Attorney General over the conduct of many private individuals. No factual determination is required of the Attorney General; instead, it is entirely up to his discretion. Such a delegation is inconsistent with the original meaning of the Legislative Vesting Clause, and the Court should rule it unconstitutional.

ARGUMENT

I. POWER DELEGATED BY THE PEOPLE TO CONGRESS CANNOT BE SUBDELEGATED

A. The Legislative Vesting Clause Incorporates the Common Law of Agency's Well-Established Prohibition on Subdelegation

The Constitution is an instrument of delegation. In its words, "We the people" "delegated to the United States by the Constitution" a set of enumerated powers. U.S. Const. preamble, amend. X. "The federal and state governments are in fact but different agents and trustees of the people, constituted with different powers, and designed for different purposes." *The Federalist No. 46* (James Madison).

The Constitution delegates "all legislative powers" "in a Congress of the United States," but the text alone is silent as to subdelegations of that power. U.S. Const. art. I, § 1. The original meaning of this clause, as applied to subdelegations, can be understood only in the broader context in which those words were written.

The Constitution "must be interpreted in the light of the common law, the principles and history of which

were familiarly known to the framers of the constitution." *United States v. Wong Kim Ark*, 169 U.S. 649, 654 (1898). "The language of the constitution, as has been well said, could not be understood without reference to the common law." *Id.*

The relevant common law context for this task is the common law of agency, which deals with the delegations of power from one party to another. *See* Gary Lawson & Guy Seidman, *A Great Power of Attorney: Understanding Our Fiduciary Constitution* 104–129 (2017); Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003, 1016–17 (2016); *see also* Jason Iuliano & Keith E. Whittington, *The Nondelegation Doctrine: Alive and Well*, 93 Notre Dame L. Rev. 619, 642 (2017) (surveying early case law applying the common law maxims).

James Iredell, who would become one of the first Supreme Court Justices, directly linked agency law to the Constitution. During the Constitution's ratification debates in North Carolina, Justice Iredell said that the Constitution "may be considered a great power of attorney." 4 Jonathan Elliot, *The Debates in the Several State Conventions of the Adoption of the Federal Constitution* 148 (1827). A power of attorney is the classic example of a document that creates an agency and is interpreted according to the common law of agency. Lawson & Seidman, *supra* at 3–4.

This is also demonstrated by the Constitution's ratification history. During the constitutional convention, James Wilson described the legislature as the people's "agents," stating that "[t]he people have a right to know what their agents are doing or have

done, and it should not be in the option of the Legislature to conceal their proceedings." 2 Max Farrand, *The Records of the Federal Convention of 1787* 260 (1911). At the constitutional convention itself, Oliver Ellsworth referred to Congress as the people's "agents." *Id.* at 377.

In ratifying the Constitution, the people of Rhode Island declared "[t]hat all power is naturally vested in, and consequently derived from the people; that [government officers] therefore are their trustees, and agents, and at all times amenable to them." Rhode Island Ratification 2nd point (May 29, 1790).

The Federalist Papers referred to the Constitution as "the intention of the people" and to statutes as the intention of their "agents." *The Federalist No. 78* (Alexander Hamilton). It referred to the federal government as "agents and trustees of the people." *The Federalist No. 46* (James Madison). It similarly referred to the President as the "principal agent" of appointments. *The Federalist No. 65* (Alexander Hamilton).

Government employees were commonly understood to have fiduciary duties as agents of the people. The Massachusetts Constitution referred to all officers of government, explicitly including the legislature, as the people's "agents." Mass. Const. art. V (1780). The Virginia, Vermont, and Pennsylvania Constitutions referred to all officers or magistrates of government as the people's "trustees." Va. Const. § 2 (1776); Penn. Const. declaration of rights IV (1776); Vt. Const. ch. I, § V (1777). The Maryland Constitution states that "all people invested with legislative or executive powers of government are the trustees of the public." Md. Const. art. IV (1776).

Understanding the common law of agency at the time of the Constitution's ratification requires an understanding of English common law, which described the agency law rule on subdelegation of power as such: "One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this being a trust and confidence reposed in the party, cannot be assigned to a stranger." Matthew Bacon, 1 *A New Abridgment of the Law* 320 (1768).

James Kent, Chief Justice of New York, wrote that:

> An agent ordinarily, and without express authority . . . has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. The maxim is, that *delegatus non potest delegare* [delegates cannot delegate], and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing.

2 *Commentaries on American Law* 633 (1827).

Justice Story further described this common law rule as:

> One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might

> not be selected by him for such a purpose. . . . The reason is plain; for, in each of these cases, there is an exclusive personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari* [Delegated power may not be delegated].

Commentaries on the Law of Agency § 13 (1839).

There are exceptions to the common law doctrine prohibiting subdelegations. One exception is for ministerial acts. *See Mason v. Joseph* [1804], 1 Smith 406 (KB) ("[He] cannot delegate his authority to a third person. He must exercise his own judgment on the principal subject, for the purpose of which he is appointed; but as to any mere ministerial act, it is not necessary that he should do it in person, if he direct it to be done, or, upon a full knowledge of it, adopt it."). This exception will become very important for delegations concerning questions of fact.

The Court, in *Marbury v. Madison* (1803), laid out what is required for an action to be ministerial:

> [T]he subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. . . . This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible [courses]; but is a precise course accurately marked out by law, and is to be strictly pursued. . . . It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

5 U.S. 137, 158.

The key distinction of a ministerial act is that it gives no choice once the preconditions are satisfied—it

must be performed. Some judgment or wisdom may be necessary to determine if the preconditions have been satisfied, but that isn't the kind of judgment which involves discretionary power. When the duty of an officer just depends on the occurrence of a fact, the obligation of the officer is still a ministerial duty and can be subdelegated. It has long been considered the case that all public offices involving judgment or discretion are prohibited from delegating their duties. Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 567 (1890).

That agency law is the basis of the limitation on subdelegation of legislative power is reinforced by early state supreme court decisions applying this doctrine. *See, e.g., Marr v. Enloe,* 9 Tenn. (1 Yer.) 452, 453 (1830); *People ex rel. Caldwell v. Reynolds,* 10 Ill. (5 Gilm.) 1, 11 (1848).

Many of the state supreme courts cited the trust, discretion, or judgment placed in legislators' hands as prohibiting subdelegation, the same conditions prohibiting subdelegation under the common law of agency. *See, e.g., State v. Field,* 17 Mo. 529, 533 (1853) (describing the prudence and wisdom required of legislators as prohibiting subdelegation); *Moore v. Allen,* 30 Ky. (7 J.J. Marsh.) 651, 652 (1832) (describing a "personal trust" that could not be subdelegated).

Many of these cases explicitly referred to the Latin maxim cited by Justice Story above—"*Delegata potestas non potest delegari*" [Delegated power may not be delegated]. *See, e.g., Parker v. Commonwealth,* 6 Pa. 507, 515 (1847); *Thorne v. Cramer,* 15 Barb. 112, 116 (N.Y. Gen. Term 1851); *Franklin Bridge Co. v. Wood,* 14 Ga. 80, 83 (1853).

The reason for this common law rule, according to the state supreme courts, was the threat of abuse. In the words of one court, "faithless legislators anxious to escape the responsibility of their position" would abuse delegations. *Field*, 17 Mo. at 533. The highest court in New York held that a person doesn't have to become a legislator, but if he does,

> he takes it with all its duties and responsibilities; and, as a true and faithful agent, he cannot shrink from meeting and discharging them. And, above all, he cannot delegate to others the trust which has been expressly confided to him, by reason of his supposed knowledge and sound judgment. *Delegata potestas, non potest delegati*, is a settled maxim of the common law, in full force at the present day; and never more applicable than to the case of a legislator.

Thorne, 15 Barb. at 116.

The first legislative debate concerning the nondelegation doctrine occurred in 1798. The House of Representatives was considering a bill to delegate to the President the power to raise an army "whenever he shall judge the public safety shall require." 8 Annals of Cong. 1631 (Joseph Gales, ed. 1798). As Rep. Richard Brent reportedly described it:

> Congress, then, in whom alone the Constitution has placed the power of raising armies, will be deprived, during that time, of that power. And if Congress have the power of divesting themselves of this right, and transferring it for six years, they may do it for ten years or for a term equal to the existence of the Constitution.

> But he did not believe they had the power of making this transfer.

Id. at 1638. "No person has said Congress could not authorize the President to raise an army for the defence of the country; but it was denied that the power could be transferred from Congress to him, to determine whether it should or should not be raised." *Id.* at 1649.

Rep. Abraham Gallatin recognized:

> [T]he principle of the Constitution is, that no department of Government can exercise that power which has been given to another department. Gentlemen, however, seem to suppose the Constitution may remain inviolate so long as there is no forcible assumption of power by any branch of Government from the other, and that a transfer or free gift of such power would not be a violation of the Constitution. He considered the effect to be precisely the same whichever way it was done. The object of the Constitution was to assign forever certain specific Legislative powers to Congress, and certain other powers to the Executive, and whenever one department shall exercise the powers of the other, in whatever way it shall be done, the Constitution will be broken, and the security intended by it will no longer exist.

Id. at 1655.

He called this delegation a "dangerous principle, and if once admitted, it would be in the power of Congress to destroy the Constitution." *Id.* at 1656.

Some members said it was an "improper time to mention Constitutional scruples; that this was a time for acting," but Rep. William Claiborne rejected this proclaiming that

> [T]he Constitution, that palladium of our rights, never could be too sacredly guarded, and this of all others is the proper time to take care it is not invaded. In times of tranquillity, Congress do not feel disposed to surrender their authority; but when danger approaches, and alarm is everywhere gone abroad. Then it is that Congress may be most likely to be prevailed on to give up powers to the Executive, from an idea of promoting the public good, (but which may prove its greatest misfortune,) which, at other times, they would hold with the greatest tenaciousness.

Id. at 1653.

Claiborne's warnings are eerily accurate to what occurred during World War II, as will be shown in Part III below.

Two amendments were proposed to fix the constitutionality of the bill. One would have stricken the delegation entirely, and the other limited it to "the event of a declaration of war against the United States, or of actual invasion of their territory by a foreign Power, or of imminent danger of such invasion, discovered, in his opinion, to exist." *Id.* at 1631.

Rep. Charles Pinckney said "all must be agreed" that the powers of government cannot be "assigned or relinquished." *Id.* at 1660. But the dispute was over applying that principle to the latter amendment, which made it conditional on "certain contingences" in

which "every Constitutional objection must fall to the ground." *Id.*

In making the argument for the latter amendment, Rep. Harrison Otis said, "Wherever absolute power was invested, there could be no doubt [that it was unconstitutional] but that power might be executed upon a condition." *Id.* at 1641. He noted that "all the three contingencies [are] perfectly definite in their nature" and would instead make "the raising of the army depend upon certain contingencies, to be judged of by the President." *Id.*

Striking the entire delegation was defeated, *id.* at 1682, but so was the delegation to the President to raise an army as "public safety shall require." *Id.* at 1684. Instead the authority was limited to being conditioned on specific factual circumstances of a declaration of war or an actual or imminent invasion. *Id.* at 1689. The Fifth Congress rejected the constitutionality of delegating vague policy questions, while also affirmatively accepting the constitutionality of delegating specific factual determinations.

It is sometimes claimed that the nondelegation doctrine is dead in the modern era because it has not been used to strike down federal statutes. However, this Court has acknowledged that it enforces the nondelegation doctrine primarily through the canon of constitutional avoidance. *Mistretta v. United States*, 488 U.S. 361, 374 n.7 (1989) ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). In this

way the nondelegation doctrine is actively enforced by the Court even if no statute is ruled unconstitutional.

It is also worth considering the phrase "office of trust" which is used in the Impeachment Clause, U.S. Const. art. I, § 3, and the Emoluments Clause, U.S. Const. art. II, § 1, and the Ineligibility Clause, U.S. Const. art. I, § 6, cl. 2. There is a common law distinction between a ministerial office and an office "of trust." The latter involves the use of discretion or judgment and thus it cannot be delegated. *King v. Alice Stubbs and others* [1788] 2 T. R. 395, 402 (KB) ("[A]n office of trust cannot be assigned; neither can it be executed by a deputy, unless power be expressly given for that purpose."). Sir William Blackstone distinguished "offices of public trust" from "ministerial offices" as only the latter "may be executed by deputy." 2 Blackstone, *Commentaries on the Laws of England* 36 (1753). As the office of a legislator involves such discretion and judgment, it is an office of trust that cannot be delegated. This is further evidence of how the law of agency limits delegation in the text of the Constitution.

B. The Delegation of Lawmaking to the Executive Was, According to Blackstone, "The Most Despotic Tyranny" and "Fatal to the Liberties of This Kingdom"

The prohibition on subdelegations of power did not originate in the Founding era. This principle was first confirmed by the famous English jurist Henry de Bracton in his *De Legibus et Consuetudinibus Angliae* (1268). Bracton wrote that "delegated jurisdiction cannot be delegated." 1 *De Legibus et Consuetudinibus Angliae* 443 (Sir Travers Twiss trans., Kraus 1964).

The King could only make law through Parliament. This principle was well accepted until the despotism of the Tudor monarchs. When one of them, King Henry VIII, began to issue proclamations without regard for existing statutes, many judges objected. *See* Sir John Baker, *Human Rights and the Rule of Law in Renaissance England*, 2 Nw. U.J. Int'l Hum. Rts. 3, 6 (2004). In response to their objections, the King pressured Parliament to pass the Proclamation by the Crown Act (1539). *Id.*; 31 Hen. VIII c. 8. This Act made the proclamations of the Crown "as though they were made by act of parliament." 31 Hen. VIII c. 8. While the Act was intended to legitimize the proclamations, it was limited so that it could not harm "any person's inheritance, offices, liberties, goods, chattels or life." *Id.* But even with these limitations, Parliament soon realized it was a mistake and repealed it. *See* 1 Edw. VI 6. c. 12. § 4 (1547).

Shortly before the American Revolution, several English jurists commented on the tyrannical nature of this statute. Sir William Blackstone described it as "a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed." 1 *Commentaries on the Laws of England* *271 (1765). David Hume described it as "a total subversion of the English constitution." 4 *The History of England from the Invasion of Julius Caesar to the Revolution in 1688* 196 (1789). Thomas Bever, an English scholar at Oxford, wrote that "[s]uch an unnatural scheme was indeed really affected, for a short time, in the bloody and tyrannical reign of Henry VIII, when the parliament, awed into subjection by the frowns of a monster, passed a kind of *'lex regia'* in those unpopular and disgraceful statutes, wherein the king's

proclamations were indulged with the full force of regular laws." *A Discourse on the Study of Jurisprudence and the Civil Law* 22 (1766).

Even after the Proclamation by the Crown Act was repealed, the Tudor monarchs continued issuing proclamations that purported to establish crimes unsupported by statutes. The House of Commons objected to a proclamation by the King prohibiting new buildings in London upon his own authority, and Sir Edward Coke, Chief Justice of the King's Bench, was asked to rule on the legality of the proclamation. *Case of Proclamations*, 77 ER 1352 (1611). Coke and his fellow judges ruled that "the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm. . . . also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not . . . ergo, that which cannot be punished without proclamation, cannot be punished with it." *Id.* As such, he held that the proclamation at issue was "utterly against law and reason, and for that void." *Id.*

It is upon this history that John Locke, one of the most influential of Enlightenment thinkers, wrote:

> The legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others. . . . And when the people have said, We will submit to rules, and be govern'd by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are

> enacted by those, whom they have chosen, and authorised to make Laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what the positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.

Second Treatise of Civil Government, Chap. XI (1690).

It is here that Locke makes the explicit link between the "delegated power from the people" and the doctrine that the "legislative can have no power to transfer their authority of making laws, and place it in other hands." *Id.*

II. THE LEGISLATIVE VESTING CLAUSE IS VIOLATED WHEN ANYONE OTHER THAN CONGRESS HAS DISCRETION OVER THE RULES OF PRIVATE CONDUCT UNDER FEDERAL LAW

To apply agency law to the Legislative Vesting Clause first requires defining the terms used. The three types of governmental powers correspond to the temporal focus of the power: Legislative powers are prospective, focusing on what future private conduct violates the law; while judicial powers are retrospective, focusing on whether past private conduct violated the law. *See Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 311–12 (1994) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student.") (quoting *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982)). Executive powers are focused on the present and concern the day-

to-day operations of government including who should currently be arrested or prosecuted. Only delegations concerning rules of private conduct involve legislative powers and could potentially violate the Legislative Vesting Clause.

Critics of the nondelegation doctrine claim that there cannot be a prohibition on discretionary delegation by Congress because the President must be able to delegate the power to prosecute or arrest people. Cynthia R. Farina, *Deconstructing Nondelegation*, 33 Harv. J.L. & Pub. Pol'y 87, 92 (2010). This misunderstands what has been delegated to the President. It assumes that all executive powers, such as the power to arrest or prosecute, have been delegated to the President, but, as shown directly below, this isn't what the text of the Constitution says. *See* Dina Mishra, *An Executive-Power Non-Delegation Doctrine for the Private Administration of Federal Law*, 68 Vand. L. Rev. 1509, 1532–33 (2015).

To begin with, the powers delegated to the different branches of government are not all the same in scope. The Constitution vests Congress with powers in the plural ("all legislative *powers* herein granted"). *Id.* In contrast, the executive and judicial branches are delegated power in the singular ("the executive *power*" and "the judicial *power*"). *Id.*

Instead of delegating all powers of an executive nature, "the executive power," as the Court defined it in *Myers v. United States*, 272 U.S. 52, 163–64 (1926), is "the general administrative control of those executing the laws." "The executive power" embodies the ultimate control over all officers using powers of an executive nature. Many executive powers, such as the power to arrest or prosecute, are not delegated to the

President through the Executive Vesting Clause. Those powers are exercised by officers other than the President, but the Executive Vesting Clause requires the President to remain in control of these officers.

In contrast, because Congress is delegated "all legislative powers herein granted," all federal legislative powers involving substantial judgment and discretion cannot be subdelegated by Congress to any other officer. *See infra* Part I.A. As will be shown below, ministerial duties, such as the determination of certain facts, do not involve substantial discretion and judgment, and so delegating such duties does not violate the Legislative Vesting Clause.

A. It Is Permissible to Delegate Factual Determinations that Do Not Involve Judgment or Discretion

Congress was designed to be in session only for a limited period of time before it would adjourn *sine die*, when members of Congress would return to their home state for several months. Conditions could change during the time in which Congress was not in session. Conditional legislation—legislation that depended on some future event occurring before it would become effective—was a solution to this problem.

Conditional legislation is designed to solve certain rule-of-law problems. It may be difficult to determine if a given event has occurred. This creates an indeterminacy in the law that can hamper the ability of people to plan their actions to comply with the law. Some may decide, out of an abundance of caution, to avoid potentially illicit acts just in case they may violate the law. But unless and until the condition specified in the law has been satisfied, burdening such activities is not the law's intention. Thus, beginning

with the First Congress, the law has sometimes required the President to proclaim that certain factual circumstances upon which the law is conditioned have occurred, so that everyone is on notice of what the law requires of them. But does the President's power to do this constitute an impermissible delegation? As shown directly below, the answer is no, and this is because it is merely a ministerial duty conditioned on a factual occurrence.

The Court first considered the nondelegation doctrine's application to such conditional legislation in *Cargo of the Brig Aurora v. United States* (1813). 11 U.S. (7 Cranch) 382. The plaintiff claimed that "Congress could not transfer legislative power to the President; to make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of law." *Id.* at 386. The government responded that "the legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." *Id.* at 387. The Court held that the legislature could "exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct." *Id.* at 388. Although the Court did not expressly state why this was valid, it presumably accepted the government's contention that the President was merely ascertaining the existence of a fact. As the Court would later describe this, "the suspension was absolutely required when the [P]resident ascertained the existence of a particular fact." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892). As such, this was a ministerial duty whose performance requires no discretion.

In *Field v. Clark*, the Court again addressed the nondelegation doctrine in a case very similar to *The Brig Aurora*, in that both concerned whether a presidential proclamation could increase tariffs. The Court reaffirmed the nondelegation doctrine—namely, that "Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution." *Id.* at 692. As in *The Brig Aurora*, the Court viewed this as valid conditional legislation, but went into greater detail explaining why: "Nothing involving the expediency or the just operation of such legislation was left to the determination of the President." *Id.* at 693. This was valid conditional legislation because the President had "no discretion" and merely "ascertained the existence of a particular fact" on which Congress had made the statute depend. *Id.* The delegation of a ministerial duty—one that does not involve discretion and judgment—to determine a fact does not violate the Legislative Vesting Clause. On the other hand, "expediency" or "just operation" are examples given by the Court of legislative policy decisions that cannot be delegated. *Id.*

This is further illustrated by *J.W. Hampton*, in which Congress decided to impose a tariff to equalize the differences in the cost of production between the United States and foreign countries. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 404 (1928). Congress required the President to announce the "differences in costs of production in the United States and the principal competing country." *Id.* at 401. The Court described the facts that the President was to announce as "perfectly clear and perfectly intelligible." *Id.* at 404. The President was to use investigators in

"obtaining needed data and ascertaining the facts justifying readjustments." *Id.* at 405. Determining these facts may not have been a simple task, but it did not rely on the discretion or judgment of the President to do what he thought best.

Some commentators wrongly think that *J.W. Hampton* somehow changed or rejected the nondelegation doctrine. *See, e.g.*, David Schoenbrod, *Power Without Responsibility* 35 (1993). This is incorrect. Indeed, *J.W. Hampton* is yet one more example of applying the same rules as *The Brig Aurora* and *Field v. Clark*.

The Court in *J.W. Hampton* explicitly endorsed the classic nondelegation doctrine with the same words used by Justice Story: "The well known maxim '*delegata potestas non potest delegari*,' applicable to the law of agency in the general and common law, is well understood, and has had wider application in the construction of our federal and state constitutions than it has in private law." *Id.* at 405–06. The Court made clear that "discretion as to what [the law] shall be" cannot be delegated to the executive branch. *Id.* at 407. Instead, only the "application of such rules to particular situations and the investigation of facts" can be delegated to the executive. *Id.* at 408.

J.W. Hampton was the first case to mention an "intelligible principle" in discussing valid delegation. *Id.* at 409. This was nothing more than what was expressed earlier in the case: there must be a way of deciding if facts meet the legal standard set by Congress without discretion. Only Congress may set the standard; after that, the executive must determine whether the facts meet that standard. Crucially, however, "nothing involving the expediency or just

operation of such legislation was left to the determination of the President." *Id.* at 410. In short, the Court's judgment in *J.W. Hampton* is perfectly consistent with *The Brig Aurora* and *Field*.

In *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), the Court applied the exact same principles concerning conditional legislation to strike down a provision of the National Industrial Recovery Act. This case is still good law and is the closest case to the issue presently before the Court. The Court recognized that "authorizations given by Congress to selected instrumentalities for the purpose of ascertaining the existence of facts to which legislation is directed have constantly been sustained." *Id.* at 426. But with respect to that provision, the Court held that it "does not state in what circumstances or under what conditions the President is to prohibit the transportation" of petroleum products. *Id.* at 415. It "does not require any finding by the President as a condition of his action." *Id.* In other words, "Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances." *Id.* at 418. This doomed the provision, and the Court held it unconstitutional. *Id.* at 433.

A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), was almost identical to *Panama Refining Co.* Both concerned the National Industrial Recovery Act, although different provisions were involved. The Court held that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable." *Id.* at 537–38. It

would have been constitutional had it "undertake[n] to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure," but that is not what this statute did. *Id.* at 541. "Instead of prescribing rules of conduct, it authorize[d] the making of codes to prescribe them" and due to the "*discretion* of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. . . . [A]uthority thus conferred is an unconstitutional delegation of legislative power." *Id.* at 541–42 (emphasis added)

In short, the Court recognized the power of Congress to delegate the ministerial duty of determining a fact to the executive. Such delegations cannot involve discretion that is not bound by factual determinations.

III. THE COURT'S WORLD WAR II CASES MISAPPLIED PRECEDENT TO ALLOW IMPERMISSIBLE DELEGATIONS

As discussed above, prior to the World War II, Congress and the Courts required that the facts to be determined by the executive be set by Congress. But during the World War II era, the Court allowed the President to not only determine facts, but also to judgmentally select the facts on which policy is based. This doctrine undermined the strict separation of powers that had existed before by allowing delegation of substantial discretion.

The basis for this began, innocently enough, with two earlier cases on the management of federal lands. The Court reached the right result in those cases, but failed to explain the limitations of its reasoning.

In *Union Bridge Co. v. United States*, Congress had delegated to the Secretary of War the power to determine whether a bridge over the waters of the United States, which is federal property, was an "unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise." 204 U.S. 364, 366 (1907). Likewise, in *United States v. Grimaud*, Congress had delegated to the Secretary of Agriculture to make "rules and regulations" over harvesting federal forest reserves. 220 U.S. 506, 509 (1911).

The Court cited *Wayman v. Southard*, 23 U.S. 1 (1825), concerning the ability to delegate the power to "fill up the details." *Grimaud*, 220 U.S. 506 (1911). But the Court did not mention the limitation that certain subjects "must be entirely regulated by the legislature itself." *Wayman*, 23 U.S. at 43. Rules concerning federal land could be delegated under such general provisions, but rules of private conduct on private land "must be entirely regulated by the legislature itself." *Id.*

The nondelegation doctrine does not apply to Congress' power over federal land. In fact, Congress has, starting in 1787 with the Northwest Ordinance, explicitly delegated completely discretionary legislative power to territorial governments within the territory owned by the federal government. 1 Stat. 50. ("The governor and judges, or a majority of them, shall adopt and publish in the district, such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district."). The Northwest Ordinance was enacted in the middle of the Constitutional Convention (it was re-enacted after the Constitution was ratified) and the

Territory Clause, U.S. Const. art. IV § 3 cl. 2, was specifically designed to allow Congress to dispose of such territory by, among other things, the delegation of "rules and regulations." James Madison even commented that the Northwest Ordinance was "without the least color of constitutional authority" prior to the adoption of the Constitution. *The Federalist No. 38* (James Madison). In short, the nondelegation doctrine does not appear to apply within federally owned land, due to the Territory Clause's explicit authorization, and so delegations can be made by Congress pursuant to only general provisions.

Union Bridge Co. and *Grimaud* were thus correctly decided. But during World War II these precedents were applied to cases that did not involve federal land.

One such case was *Yakus v. United States*, 321 U.S. 414 (1944). In the Emergency Price Control Act of 1942, Congress had, as a temporary wartime measure, delegated to the Price Administrator the power to set maximum prices on all commodities and rents. *Id.* at 419. Although the administrator was required to give "due consideration" to prior prices, he was not bound by them and could "make adjustments for such relevant factors as he may determine." *Id.* at 421.

In *Yakus*, the Court, for the first time, accepted delegations of the power to judgmentally select the facts on which policy is based. *Id.* at 424 (holding the Constitution "does not require that Congress find for itself every fact upon which it desires to base legislative action"). The Court noted that it is the "legislative function" to set the "binding rule of conduct" but that in this case the rule was to obey the Price Administrator. *Id.* Such a rule, if it were the only

limitation, would allow the delegation of all legislative powers to the executive, but the Court did not acknowledge this. Instead, it rejected the idea that a statute "call[ing] for the exercise of judgment" by the executive would violate the Constitution. *Id.* at 425. While nominally accepting the prohibition on delegating legislative powers, the Court allowed precisely what the nondelegation doctrine prohibits.

It is perhaps understandable that *Yakus* deviated from the constitutional requirements. It was issued in the middle of World War II, within months of D-Day. The statute concerned temporary emergency regulation to provide for the war effort. For similar reasons, the Court upheld the blanket delegated authority to determine the undefined term "excessive profits" in another World War II case, *Lichter v. United States* (1948). 334 U.S. 742, 783. In doing so, the Court went well beyond the prior limitations on delegated power while emphasizing the need to support the war effort.

As with *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing the internment of Japanese Americans), we should recognize these cases as war-related deviations from constitutional requirements.

It is in this light that the Court should look at *Yakus, Lichter,* and *Korematsu*, as precedents that at the time were viewed as necessary to preserve the nation, but which, upon further reflection, should be seen as unconstitutional.

IV. SORNA UNCONSTITUTIONALLY DELEGATES DISCRETIONARY LEGISLATIVE POWER TO THE ATTORNEY GENERAL

34 U.S.C. § 20913(d) delegates to the Attorney General is delegated the authority to decide if any provision, or no provision, of the Sex Offender Registration and Notification Act applies to sex offenders convicted prior to the enactment of this Act. 34 U.S.C. § 20913(d). Additionally, the Attorney General is delegated the authority to "prescribe rules for the registration of any such sex offenders" which may be the same or different than any provision of the Act. *Id.*

There are no facts that the Attorney General is required to determine for the applicability of these provisions to any such person. The statute gives blanket authority to the Attorney General to provide for whatever rules of conduct he chooses, unrestricted by any factual preconditions.

In *United States v. Nichols*, 784 F.3d 666 (10th Cir. 2015), Justice Gorsuch, then on the 10th Circuit, considered the very statutory provision at issue in this case. Justice Gorsuch would have correctly struck down the statute, and he accurately described what the common law requires:

> [T]hree "meaningful" limitations emerge: (1) Congress must set forth a clear and generally applicable rule . . . that (2) hinges on a factual determination by the Executive . . . and (3) the statute provides criteria the Executive must employ when making its finding.

Id. at 673 (Gorsuch, J., dissenting from the denial of rehearing *en banc*).

But Justice Gorsuch applied such a standard only to a "delegation challenge in the criminal context." *Id.* While it is true, as Justice Gorsuch noted, that "the law routinely demands clearer legislative direction in the criminal context than it does in the civil," *id.* at 673, this doesn't apply in this context. Neither the Constitution nor the common law makes the nondelegation doctrine more applicable in a criminal context. Congress is delegated "all legislative powers herein granted," not all penal legislative powers. As Justice Gorsuch recognized recently:

> Ours is a world filled with more and more civil laws bearing more and more extravagant punishments. Today's "civil" penalties include confiscatory rather than compensatory fines, forfeiture provisions that allow homes to be taken, remedies that strip persons of their professional licenses and livelihoods, and the power to commit persons against their will indefinitely. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies.

Sessions v. Dimaya, 138 S. Ct. 1204, 1229 (2018) (Gorsuch, J., concurring).

If a person hasn't broken the law, as set by Congress, then taking his property violates the Constitution just as much as taking his liberty. *The Brig Aurora*, the very first case in which the Supreme Court considered the nondelegation doctrine, and *Field v. Clark* were both civil actions having no person's liberty at stake and yet the nondelegation doctrine was just as applicable there. The Court should resist the temptation to apply a stricter

standard in the criminal context and instead apply the nondelegation doctrine to all cases as the Constitution requires. If not this, then it should at least expressly reserve the question of the doctrine's application in the civil context so that lower courts can consider it.

To the extent that the Court considers *Yakus*, *Lichter*, and similar cases applicable to the instant case, it should overturn them. It is not necessary to overturn these cases to decide this case, as this case could be decided on narrower grounds, but doing so would bring clarity to lower courts. This line of cases is beyond the limited ministerial duties that the Founders understood could be validly delegated.

As there is no limitation on the Attorney General's authority to issue the challenged binding rules of private conduct, the Court should strike down 34 U.S.C. § 20913(d) as violating the Legislative Vesting Clause.

CONCLUSION

For the foregoing reasons, this Court should hold that 34 U.S.C. § 20913(d) is unconstitutional as it violates the nondelegation doctrine.

Respectfully submitted,

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